Supreme Court, U.S.
FILED
NOV 30 1996

No. 96-430

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARINE SHALE PROCESSORS, INC., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency acted consistently with Article III and the Seventh Amendment when it denied petitioner's application for a permit under the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, while the government had pending in district court an enforcement action against petitioner charging past violations of the Act.

2. Whether the Environmental Protection Agency violated principles of due process by utilizing some agency personnel in both the permitting proceeding and the enforcement case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 81 F.3d 1371. The final decision and order of the Environmental Appeals Board of the Environmental Protection Agency (Pet. App. 130a-201a) is reported at 5 E.A.D. 751.

JURISDICTION

The judgment of the court of appeals (Pet. App. 209a) was entered on April 18, 1996. A petition for rehearing was denied on June 18, 1996. Pet. App. 207a-208a. The petition for a writ of certiorari was filed on September 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Environmental Protection Agency (EPA) administers the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, which regulates the treatment, storage, and disposal of hazardous wastes. See *Meghrig* v. *KFC Western, Inc.*, 116 S. Ct. 1251 (1996). Petitioner applied for a permit under RCRA to operate equipment that burns hazardous waste. EPA denied petitioner's application for a permit, Pet. App. 60a-129a, and EPA's Environmental Appeals Board affirmed that decision, *id.* at 130a-201a. See *id.* at 204a-206a. Petitioner filed a petition for review in the court of appeals, and the court affirmed EPA's decision. *Id.* at 1a-29a.

1. EPA has promulgated regulations governing the treatment, storage, and disposal of hazardous wastes. See 40 C.F.R. Pts. 260-282. Since 1981, those regulations have required operators of hazardous waste "incinerators" to obtain a RCRA permit. See 46 Fed. Reg. 7666 (1981). In 1985, EPA explicitly exempted "industrial furnaces" that recycled hazardous wastes from the permitting requirement. See 50 Fed. Reg. 614, 647-648 (1985). In 1991, EPA revised that exemption, providing that all operators of devices that use thermal combustion to treat hazardous wastes must have either an incinerator permit, 40 C.F.R. 264.340 *et seq.*, or a boiler and industrial furnace (BIF) permit, 40 C.F.R. 266.100 *et seq.* 56 Fed. Reg. 7134, 7138 (1991). See Pet. App. 2a-3a.

2. On June 14, 1990, the United States brought a civil enforcement action against petitioner alleging that it had illegally incinerated hazardous wastes without obtaining an incinerator permit. Petitioner defended against that action on the theory that it was

operating an "aggregate kiln" that qualified as an industrial furnace that recycled hazardous wastes. See 40 C.F.R. 260.10 (defining "incinerator" and "industrial furnace"). Petitioner contended that it therefore qualified for the regulatory exemption then in force. See Pet. App. 2a-3a.

The district court conducted a jury trial in 1994 on the primary RCRA claims. The jury deadlocked on certain key interrogatories, including:

> 1. Was MSP entitled to a recycler exemption from the requirement of a permit as an operator of an incinerator of hazardous wastes?
>
> 2. Were all of the hazardous wastes accepted by MSP beneficially used or reused or legitimately recycled?

Pet. App. 30a. On two other interrogatories, the jury found as follows:

> 10. Is MSP's rotary kiln an aggregate kiln? Yes.
>
> 13. Are the rotary kiln, Oxidizers Nos. 1 and 2, and slag box part of a kiln system that produces aggregate? Yes.

Id. at 32a. On June 21, 1994, the court denied the United States' and petitioner's motions for judgment under Fed. R. Civ. P. 54(b), because the jury had failed to resolve the critical interrogatories related to recycling. Pet. App. 42a-46a; see also *id.* at 3a-4a, 143a-147a.

3. In May 1991, while the civil enforcement action was pending and after EPA had promulgated the rule requiring industrial furnaces to obtain a permit, petitioner filed an application for a BIF permit with EPA's Region VI office. Petitioner claimed (as it had

in the civil enforcement action) that it operated an aggregate kiln that qualified as an industrial furnace. On January 31, 1994, the Region proposed to deny petitioner's BIF permit application on the ground that the equipment at issue did not qualify as an industrial furnace within the meaning of EPA's regulations. On September 15, 1994, after providing an opportunity for petitioner and the public to comment on the proposed denial, and after considering additional information, the Region issued an order denying petitioner's permit application for the reasons articulated in the proposed denial. Pet. App. 60a-129a.

4. Petitioner requested review of the Region's order by EPA's Environmental Appeals Board, which provides a centralized forum for agency review of certain permitting decisions. See 40 C.F.R. 124.19. The Appeals Board affirmed the Region's denial of the permit application. Pet. App. 130a, 195a-196a. The Board, which conducted an independent review of the administrative record, concluded that petitioner's equipment is not an industrial furnace. *Id.* at 152a-164a, 194a-196a. The Board rejected petitioner's contention that EPA was bound by the jury's findings in the civil enforcement action, noting that the verdict did not result in a final appealable judgment. *Id.* at 165a-172a. The Board also rejected petitioner's arguments that the permit decision violated the separation of powers doctrine, the Seventh Amendment, and the Due Process Clause. See *id.* at 172a-194a.

5. Upon remand from the Environmental Appeals Board, EPA's Regional Administrator issued a final decision denying petitioner's permit application. Pet. App. 204a-206a. Petitioner filed a petition with the court of appeals seeking review of the permit denial.

Petitioner contended that EPA's decision was arbitrary and capricious and also raised arguments based on Article III, the Seventh Amendment, collateral estoppel, and the Due Process Clause. The court of appeals rejected all of petitioners' contentions and affirmed EPA's decision. *Id.* at 1a-29a.[1]

The court found no merit in petitioner's contention under Article III that EPA could not rule on the permit application while the civil enforcement action was pending. The court noted that the two proceedings addressed different issues and that EPA's decision to grant or deny the permit would not affect the district court's authority to determine, as an independent matter, whether petitioner was in past violation of RCRA requirements. Pet. App. 7a-10a. The court similarly concluded that EPA's permit decision would not infringe on petitioner's Seventh Amendment right to a jury trial on factual issues relating to the past violations. *Id.* at 10a-11a. The court also ruled that the jury's partial verdict did not pose a collateral estoppel bar, because it did not resolve questions that were "crucial to EPA's decision to deny MSP's permit application." *Id.* at 11a-12a; see *id.* at 12a-14a.

The court of appeals next examined the administrative record and concluded that it amply supported EPA's determination that petitioner did not operate an "industrial furnace" within the meaning of EPA's regulations. Pet. App. 15a-24a. The court agreed

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[1] On the same day, the same panel of the court of appeals also decided two appeals arising from the civil enforcement proceeding. See *United States* v. *Marine Shale Processors, Inc.*, 81 F.3d 1329 (5th Cir. 1996); *United States* v. *Marine Shale Processors, Inc.*, 81 F.3d 1361 (5th Cir. 1996).

with EPA that petitioner's facility does not "use thermal treatment to accomplish recovery of materials or energy," *id.* at 15a, which is the core definitional requirement of an industrial furnace. See 40 C.F.R. 260.10. The court also rejected petitioner's contention that EPA had violated the Due Process Clause by utilizing the services of two Region VI employees in both the enforcement case and the permit proceeding. Pet. App. 24a-28a. The court of appeals noted that the limited overlap of their responsibilities fell far short of what is required to establish a violation of due process. *Ibid.*[2]

ARGUMENT

Petitioner contends that EPA's denial of its application for a RCRA permit violates Article III, the Seventh Amendment, and the Due Process Clause. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner's contentions, which arise from the specific facts of this case and do not present any question of widespread importance, do not warrant review by this Court.

1. Petitioner contends (Pet. 11-16) that Article III and the Seventh Amendment prohibited EPA from ruling on petitioner's permit application while the enforcement case was pending in the district court. That novel argument finds no support in the decisions

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[2] The court of appeals denied petitioner's motion to recall and stay issuance of the mandate pending petition for writ of certiorari. On July 1, 1996, Justice Scalia also denied an application to recall and stay the mandate pending certiorari. See *Marine Shale Processors, Inc.* v. *United States Environmental Protection Agency*, No. A-1056.

of this Court. As the court of appeals recognized, Congress may vest administrative agencies with authority to adjudicate a wide variety of "public rights." See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-55 (1989); *Thomas* v. *Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 593-594 (1985); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 455 (1977). Such authority unquestionably includes the power to grant or deny permits to engage in regulated activities. See, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1939); Administrative Procedure Act, 5 U.S.C. 551 *et seq.* There is no reason why an agency may not make such decisions while a civil enforcement action is pending. Pet. App. 7a-8a.

Petitioner can cite no statutory or constitutional authority holding that the government's initiation of an enforcement action irretrievably commits all related matters—including the defendant's prospective entitlement, under revised regulations, to a permit—within the judicial branch. Pet. App. 8a. To the contrary, this Court has recognized that the Executive Branch and the courts may simultaneously consider related issues within their respective spheres. *E.g.*, *Touby* v. *United States*, 500 U.S. 160, 162-164 (1991) (indicating that the United States may permanently schedule a controlled substance while proceeding with a criminal enforcement action based on a temporary scheduling). Cf. *United States* v. *Kordel*, 397 U.S. 1, 11 (1970) ("It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal proceeding once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."). In this case, EPA exercised the administrative authority delegated to it

by Congress to review permit applications under RCRA. Its review of the permit application has not usurped the function or power of the judiciary in adjudicating a pending enforcement action for past violations of the Act.

Contrary to petitioner's suggestion, EPA's action has not interfered with the district court enforcement action in any way. See Pet. App. 7a-8a. As the court of appeals properly recognized, EPA's decision whether to issue a prospective permit had no effect on the pending enforcement action, which is concerned solely with past violations. *Id.* at 7a. EPA has not attempted "to use the rulings in the permit proceeding to collaterally estop [petitioner] in the district court action." *Id.* at 8a. Hence, the situation bears no similarity to the case that would be posed if Congress or an Executive Branch agency attempted to revise an Article III court's decision. Compare *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Town of Deerfield* v. *FCC*, 992 F.2d 420, 427-428 (2d Cir. 1993).

Furthermore, as the court of appeals also explained, the issues in the permit proceeding and the enforcement action are distinctly different. Pet. App. 7a, 12a-15a. In the enforcement action, the district court was charged with determining whether petitioner had committed past violations of RCRA's regulatory requirements, while in the permit proceeding, EPA was charged with determining whether petitioner qualified for a permit under the revised regulations. *Id.* at 7a. The central issue of the permit proceeding was not resolved by the district court litigation. The special jury verdict that petitioner operated an "aggregate kiln" (which was never reduced to a final appeal-

able judgment and was not entitled to any collateral estoppel effect) did not resolve the question of whether petitioner was entitled to a permit for operation of an "industrial furnace." See *id.* at 12a-15a. That issue depended on the additional inquiry of whether petitioner's equipment operated as an "integral component[] of [a] manufacturing process[]" and whether it "use[d] thermal treatment to accomplish recovery of materials or energy." 40 C.F.R. 260.10.[3]

Petitioner's invocation of the Seventh Amendment adds nothing to its argument. This Court has observed that "if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera, S.A.*, 492 U.S. at 53-54. Petitioner clearly has no right to a jury trial in the permit proceeding. EPA has never disputed, however, that petitioner does have a right to a jury trial in the district court enforcement proceeding. See *Tull* v. *United States*, 481 U.S. 412 (1987). Furthermore, EPA has never denied, and the decision below does not contravene, the principle that once the jury trial right attaches, that right cannot

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[3] As petitioner concedes (Pet. 15), EPA was required to consider those additional elements of the industrial furnace definition when evaluating petitioner's permit application. The jury in the enforcement action did not resolve those questions. Pet. App. 13a. Indeed, the district court did not charge the jury to apply EPA's regulatory definition of "industrial furnace," and the jury was unable to reach a verdict on whether petitioner recycled all of the hazardous wastes that it combusted—an issue bearing directly on whether, as required by the "industrial furnace" definition, petitioner burns wastes to recover materials or energy. See *id.* at 13a-14a.

be usurped. *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 550-552 (1990). See Pet. App. 11a. EPA has not impaired in any way petitioner's right to a jury trial on the question of its past violations. Petitioner will receive a jury trial, if it so chooses, in the pending retrial of the civil enforcement action.[4]

2. Petitioner also contends (Pet. 16-21) that EPA violated due process principles by utilizing two of its employees in both the permitting matter and the enforcement case. The Court has previously considered the general question of whether an agency may use the same personnel in separate agency functions involving the same regulated party. See *Withrow* v. *Larkin*, 421 U.S. 35, 55-58 (1975). This case simply involves application of the principles announced in *Withrow* to a particular factual situation. The court of appeals correctly applied *Withrow*, and its decision does not warrant further review.

Petitioner first challenges the involvement of Dr. Davis, who was then the Director of the EPA Region VI Hazardous Waste Management Division. Dr. Davis, like all of EPA's regional directors, had responsibility for oversight of both enforcement referrals to the Department of Justice, such as the case initiated against petitioner, and permitting issues in the Region. The court of appeals correctly concluded that, under the analysis set forth in *Withrow*, there was "nothing remarkable in Dr. Davis's role in the

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[4] Contrary to petitioner's suggestion (Pet. 12), the court of appeals correctly recognized that this Court's decision in *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500 (1959), is inapposite. In that case, the Court simply held that when similar legal and equitable claims are joined in one suit, a court may not prevent the jury from deciding the legal claims by first determining the equitable issues. *Id.* at 510-511.

permitting process." Pet. App. 25a. As this Court stated in *Withrow*:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

421 U.S. at 56. A challenge to the agency employee's participation in the agency adjudication "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Id.* at 47. The court of appeals evaluated the circumstances of this case and correctly concluded that petitioner had failed to demonstrate any bias resulting from Dr. Davis's involvement in the enforcement referral. "The fact that Dr. Davis came to one conclusion based on some evidence did not at all prevent him from deciding the issue fairly when confronted with all the evidence." Pet. App. 25a.[5]

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[5] This Court rejected a similar due process claim in *FTC* v. *Cement Inst.*, 333 U.S. 683 (1948). In that case, the FTC investigated certain pricing policies and testified before Congress that members of the cement industry, including the Cement Institute, were illegally engaged in price fixing. *Id.* at 700. The Commission later brought an administrative enforcement proceeding, based on the same practices that were the subject of the congressional inquiry, and determined that the Cement Institute had illegally engaged in price fixing. The Court rejected claims of bias and prejudgment resulting from the Commission's involvement in both proceedings, because industry had the opportunity, as petitioner had here, to present evidence and argument to the Commission during the adjudica-

Petitioner next challenges the involvement of Terry Sykes, an EPA Region VI staff attorney who was involved in supporting the Department of Justice's enforcement action against petitioner. The court of appeals (like the Environmental Appeals Board) concluded that the Region made a "mistake in judgment" in assigning her to both matters. Pet. App. 26a. It determined, however, that her involvement did not result in a denial of due process. *Ibid.* The court noted that the Region had already made its initial decision to deny the permit when Sykes became involved in the process, and her role was limited to writing a draft of the findings of fact and conclusions of law. *Id.* at 25a-26a. "She had no power to decide whether to grant [petitioner] its permit, nor did she have power over those making the decision. Her role consisted entirely of articulating the thoughts and decisions of others." *Id.* at 26a. Her "small role" in the decision-making process did not lead to a violation of due process. *Ibid.*[6]

As the court of appeals recognized, petitioner was obligated to come forward with convincing evidence that "a risk of actual bias or prejudgment" was present in this case. See *Withrow*, 421 U.S. at 47. The courts of appeals have held that a party has a heavy

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tion, and because the "prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondent's [pricing] practices." *Id.* at 701.

[6] Petitioner (Pet. 19) also challenges involvement by Steven E. Silverman, an attorney in EPA's Office of General Counsel, who provided legal advice to the Region regarding the potential relevance of sham recycling criteria to the permit application. The court of appeals correctly rejected that challenge as meritless. Pet. App. 24a n.6.

burden of persuasion in contending that the combination of investigatory and adjudicatory functions has created an unconstitutional risk of bias in administrative processes. *Navistar Int'l Transp. Corp.* v. *EPA*, 941 F.2d 1339, 1360 (6th Cir. 1991) ("any alleged prejudice on the part of the decisionmaker must be evident from the record and cannot be based on speculation or inference"); *Starr* v. *FAA*, 589 F.2d 307, 315 (7th Cir. 1978) (in the absence of any showing of "personal animosity" or "wrongful purpose," agency officials are "entitled to the normal presumption of good faith"). Petitioner failed to overcome that presumption.

Petitioner contends (Pet. 18-20) that the decision below "directly conflicts" with *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994 (7th Cir. 1980). There is, however, no conflict. In *Bethlehem*, the EPA enforcement officials principally in charge of an enforcement action against Bethlehem were also principally involved as decision-makers in an agency adjudication involving Bethlehem. *Id.* at 1008-1010. In determining that this combination constituted an impermissible commingling of functions, the court based its decision on specific evidence of procedural irregularities, including EPA's failure to explain the basis of its administrative decision, EPA's failure to provide relevant parts of the administrative record, and evidence that EPA timed its administrative decision to gain a tactical advantage in the enforcement action and attempted to persuade Bethlehem to waive defenses in the enforcement action as a condition of receiving a favorable result in the administrative adjudication. *Ibid.*

None of those circumstances is present here. To the contrary, EPA provided petitioner with extensive

procedural protections. For example, EPA published a detailed statement of the basis supporting its proposed decision to deny the permit, and provided an opportunity for public comment and a public hearing, as well as independent administrative review by the Environmental Appeals Board. Pet. App. 194a-196a. Hence, as the court of appeals ruled, *Bethlehem* and this case rest on decidedly different factual situations. *Id.* at 28a; see also *id.* at 187a-194a. The relevant Seventh Circuit decision is not *Bethlehem*, but *Starr* v. *FAA*, *supra*, which recognizes that in the absence of any showing of "personal animosity" or "wrongful purpose," agency officials are "entitled to the normal presumption of good faith that, in courts of law, government officials still enjoy," and that "must be refuted by well-nigh irrefragable proof." 589 F.2d at 315.[7]

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[7] Petitioner also suggests (Pet. 20 n.2) that EPA violated substantive due process principles by denying the permit application in part because of petitioner's poor history of compliance with the environmental laws. The court of appeals found it unnecessary to reach that issue because EPA properly denied the permit on other grounds. Hence, there is no occasion for the Court to consider that issue. Pet. App. 28a-29a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996